BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RONALD E. MAHAN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,013,441
CLARKSON CONSTRUCTION COMPANY	)	
Respondent	)	
AND	)	
	)	
ACIG INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the June 28, 2005, Award entered by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on November 8, 2005.

APPEARANCES

Robert W. Harris of Kansas City, Kansas, appeared for claimant. Andrew S. Mendelson of Lee's Summit, Missouri, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are set forth in the June 28, 2005, Award. In addition, at oral argument to the Board, the parties announced they were not challenging the Judge's finding regarding task loss.

ISSUES

On October 1, 2003, claimant injured his low back, right hip, right leg and right foot. The parties stipulated that claimant's accidental injuries arose out of and in the course of his employment with respondent. In the June 28, 2005, Award, Judge Foerschler determined that as a result of the October 2003 accident claimant sustained a 43 percent wage loss and a 50 percent task loss for a 46.5 percent permanent partial general disability.

Respondent contends Judge Foerschler erred. Respondent argues claimant failed to make a good faith effort to retain his employment and, therefore, claimant's pre-injury wage should be imputed as his post-injury wage for purposes of the permanent partial general disability formula set forth in K.S.A. 44-510e. Accordingly, respondent contends claimant's permanent partial general disability percentage should be reduced to his functional impairment rating, which respondent argues is five percent. Respondent also challenges claimant's attempt to modify the Judge's finding regarding the wage loss percentage as claimant did not file an appeal to address that issue.

Claimant also argues the Judge erred. In his brief to the Board, claimant contends he has sustained a 76 percent wage loss. Regarding respondent's request to limit claimant's permanent partial general disability to his whole person functional impairment rating, claimant argues respondent did not offer to accommodate his permanent medical restrictions and, therefore, he should not be denied a work disability (a permanent partial general disability greater than the whole person functional impairment rating). Consequently, claimant requests the Board to increase his permanent partial general disability.

The only issue before the Board on this appeal is what post-injury wage should be used for the permanent partial general disability formula set forth in K.S.A. 44-510e.

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

1. The parties stipulated that on October 1, 2003, claimant sustained personal injury by accident arising out of and in the course of his employment with respondent. As a result of that accident, claimant injured his right foot, right leg, and low back. Claimant now requests permanent partial general disability benefits for the permanent impairment he has sustained due to his low back injury.

2. Claimant received conservative medical care for his low back injury. Dr. Ira H. Fishman, who was the last doctor to treat claimant, placed permanent work restrictions on claimant in July 2004 at their last visit. Those permanent restrictions were, as follows:

> No twisting. No squatting. No pushing/pulling over 35 pounds on an occasional basis only. No stooping. No lifting greater than 30 pounds knuckle to shoulder, shoulder to overhead, 20 pounds floor

> to knuckle. No repetitive bending of lower back. . . . No carrying over 20 pounds on an occasional basis.[1]

3. Dr. Fishman, who is a physical medicine and rehabilitation specialist, diagnosed claimant as having a lumbar strain and sent claimant to physical therapy. Dr. Fishman also had claimant undergo two functional capacity evaluations. But the first evaluation was deemed invalid due to claimant's symptom magnification and the second was also deemed invalid as the evaluators felt claimant did not put forth his full effort as indicated by inconsistencies between claimant's pain behavior and objective parameters. The doctor could not determine the etiology of claimant's right leg radicular pain complaints. But the doctor did believe claimant had some disc pathology in his back as an MRI scan indicated claimant had an annular tear in the lumbar disc at the L5-S1 intervertebral space and other disc degeneration at both the L4-5 and L5-S1 intervertebral levels. Dr. Fishman concluded claimant sustained a five percent whole person functional impairment as measured by the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) (4th ed.). The doctor was not asked to review claimant's former work tasks and provide an opinion regarding claimant's task loss. But the doctor did testify that claimant would not be able to return to work as a laborer building roads and bridges.

4. The record also contains the expert medical opinions of orthopedic surgeon Dr. Edward J. Prostic. Claimant's attorney hired Dr. Prostic to examine and evaluate claimant for purposes of this claim. The doctor examined claimant in September 2004 and concluded claimant had two-level disc disease with a superimposed lumbar sprain and strain. Dr. Prostic rated claimant as having a 10 percent whole person functional impairment, which the doctor testified was a compromise between the AMA *Guides'* Range of Motion model and DRE (Diagnosis-Related Estimates) model. The doctor testified, in part:

> This is a compromise between the Range of Motion model and the DRE. Under the Range of Motion model he would have been close to 20 percent and the DRE Lumbosacral II would have been 5 percent. So I compromised at 10 percent.
>
> . . . .
>
> Well, Page 99 of the Guides indicates what to do if you're not sure which DRE to use and they tell you then to go to the Range of Motion model and pick the DRE that's closest to that. But the DRE that's closest to that is clearly not something for disc disease that is

[1] Tilson Depo. at 13-14.

> relatively stable without spinal cord injury, so I don't find that it's reasonable to go that high so I stopped at 10 percent.[2]

Dr. Prostic agreed with the medical restrictions placed upon claimant by Dr. Fishman. Using those restrictions, Dr. Prostic determined claimant had lost the ability to perform 12 of the 14 work tasks that he had performed in the 15-year period before the October 2003 accident.

5. Following the October 2003 accident, claimant did not return to work for respondent as he was terminated for allegedly using drugs. Immediately after the accident, claimant had a urinalysis, which allegedly came back positive for cocaine. But claimant denied using cocaine since 1998 and he further denied using any other illegal drugs before the October 2003 accident.

6. When claimant testified at the regular hearing in February 2005, he was unemployed. But since leaving respondent's employment he had worked at a used car lot for approximately six weeks. At the car lot, which was owned by his girlfriend's mother, claimant sold and detailed cars for $200 per week plus $25 for each car he sold. According to claimant, he was unable to detail the cars due to his back injury and, therefore, he was forced to quit that job. In addition, claimant worked off and on for approximately two months as a part-time bartender. But claimant was not able to continue bartending as he was prohibited due to his earlier felony conviction. Claimant has no means of transportation and no source of income. Nonetheless, claimant has recently applied for work with three or four other companies.

7. Total Risk Management is a subsidiary owned by respondent. Anthony Tilson is employed by Total Risk Management as its loss control director. On October 7, 2003, after receiving the results of claimant's drug screen, Mr. Tilson spoke with claimant and advised him that he would need to complete a drug rehabilitation program if he wanted to retain his job. Mr. Tilson, who handles the workers compensation claims involving respondent, testified that 90 to 99 percent of the employees who successfully complete the drug rehabilitation program are permitted to continue working for respondent.

8. Claimant did not undertake the drug rehabilitation program offered by Mr. Tilson. Instead, according to Mr. Tilson, claimant advised he wanted to wait to see whether he needed any medical treatment for his injuries. Mr. Tilson's office notes from October 7, 2003, read, in part:

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[2] Prostic Depo. at 18-19.

> I just spoke to Ronald and he said he had spoken to the MRO [medical review officer] already. He told me he wanted to see what the MRI said before he would decide on rehab.[3]

After their October 7, 2003, conversation, claimant had no further contact with Mr. Tilson regarding the drug rehabilitation plan or returning to work.

9. Mr. Tilson testified he had seen other employees who worked for respondent with medical restrictions that were similar to claimant's and Mr. Tilson believed respondent was "potentially able to accommodate" claimant's medical restrictions.[4] Moreover, Mr. Tilson testified he had no knowledge of what respondent paid other employees when they returned to work following a drug rehabilitation program or whether respondent changed their wages. Mr. Tilson testified, in part:

> Q. (Mr. Mendelson) Now, I'll just represent to you this is a copy of permanent restrictions issued to Mr. Mahan by Dr. Fishman. And this piece of paper has previously been admitted as an exhibit in several other depositions in this case and it includes restrictions as of July 13th which state, "No twisting. No squatting. No pushing/pulling over 35 pounds on an occasional basis only. No stooping. No lifting greater than 30 pounds knuckle to shoulder, shoulder to overhead, 20 pounds floor to knuckle. No repetitive bending of lower back." Then at the bottom, "No carrying over 20 pounds on an occasional basis." Have you ever seen a Clarkson employee with similar restrictions?
>
> A. (Mr. Tilson) Yes, I have.
>
> Q. Are you -- do you know if Clarkson is potentially able to accommodate an employee with this type of restriction?
>
> A. Yes, they are.
>
> Q. In the past are you aware of Clarkson ever having actually accommodated employees with these type[s] of restrictions?
>
> A. Yes.

[3] Tilson Depo., Ex. 1.

[4] Tilson Depo. at 14.

> Q. If Mr. Mahan had been able to continue working for Clarkson would his rate of pay have changed?
>
> Mr. Harris: I'm going to object to that. That's speculative at this point unless there's some kind of background that he would happen to know that.
>
> Q. (By Mr. Mendelson) Do you have any knowledge about the -- about prior situations where Clarkson has put an employee back to work after going through drug rehab and whether or not they changed that employee's pay rate?
>
> A. No, I don't.
>
> Q. Okay. Do you have any knowledge of Clarkson ever lowering somebody's pay rate after going back to work after drug rehab?
>
> A. No, I do not.[5]

10. At his attorney's request, in July 2004 claimant met with vocational rehabilitation counselor Richard W. Santner to review claimant's work history and analyze his retained ability to earn wages. Mr. Santner concluded claimant retained the ability to earn between $7 and $7.50 per hour. In reaching that conclusion, Mr. Santner considered claimant's limited 10th grade education, lack of a GED, limited work experience in areas other than relatively hard manual labor, and his medical restrictions. Moreover, Mr. Santner opined that claimant would not be able to return to work in the construction industry.

CONCLUSIONS OF LAW

Because claimant has sustained a permanent injury to his low back, which is not addressed in the schedule of K.S.A. 44-510d, claimant's permanent partial disability benefits are governed by K.S.A. 44-510e. That statute provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the**

[5] *Id.* at 13-15.

> **accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[6] and *Copeland*.[7] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which paid a comparable wage. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the retained ability to earn wages rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[8]

The Kansas Court of Appeals in *Watson*[9] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

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[6] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[7] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[8] *Id.* at 320.

[9] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[10]

This record fails to establish that claimant made a good faith effort to retain his employment with respondent and, likewise, the record fails to establish that claimant made a good faith effort to find appropriate employment with other potential employers. Consequently, the Board must impute a post-injury wage for purposes of the permanent partial general disability formula set forth in K.S.A. 44-510e.

The Board also concludes that the record fails to establish that it is more probably true than not that respondent could have accommodated claimant's permanent medical restrictions and what such accommodated employment would have paid. Accordingly, the Board is left with Mr. Santner's testimony that claimant retained the ability to earn between $7 and $7.50 per hour. Consequently, the Board concludes that claimant's post-injury wage for purposes of the permanent partial general disability formula is $7.25 per hour, or $290 per week. Comparing that post-injury wage to the pre-injury wage of $1,160.91 (to which the parties stipulated) yields a wage loss of 75 percent.

As indicated above, at oral argument before the Board the parties advised they were not challenging the Judge's finding that claimant sustained a 50 percent task loss due to his low back injury. Consequently, the Board will not review that finding. Averaging the 75 percent wage loss with the 50 percent task loss creates a 63 percent permanent partial general disability under the formula set forth in K.S.A. 44-510e. Accordingly, the June 28, 2005, Award should be modified.

The Board notes that respondent challenged the Board's authority to address claimant's wage loss percentage when that issue was not raised by claimant in an appeal. That challenge, however, is without merit. Once a party files a written request for review, the Board has authority to address every issue decided by the administrative law judge.[11]

AWARD

WHEREFORE, the Board modifies the June 28, 2005, Award to increase the permanent partial general disability from 46.5 percent to 63 percent.

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[10] *Id.* at Syl. ¶ 4.

[11] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

Ronald E. Mahan is granted compensation from Clarkson Construction Company and its insurance carrier for an October 1, 2003, accident and resulting disability. Based upon an average weekly wage of $1,160.91, Mr. Mahan is entitled to receive 31 weeks of temporary total disability benefits at $440 per week, or $13,640, plus 196.27 weeks of permanent partial general disability benefits at $440 per week, or $86,360, for a 63 percent permanent partial general disability and a total not to exceed $100,000.

As of November 15, 2005, Mr. Mahan is entitled to receive 31 weeks of temporary total disability compensation at $440 per week, or $13,640, plus 79.86 weeks of permanent partial general disability compensation at $440 per week, or $35,138.40, for a total due and owing of $48,778.40, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $51,221.60 shall be paid at $440 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of November, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert W. Harris, Attorney for Claimant
Andrew S. Mendelson, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director